

What duties do members of academy trusts have?

In this article, we review what duties they undertake and consider how these are different from what they set out to be.

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With the continuing focus on academy trust governance and the development of DfE policy in response to events in the sector we are seeing increased interest and focus on the role and duties of members of academy trusts (Members). In this article, we review what duties they undertake and consider how these might be different from what they set out to be.

Role

The role of Members is prescribed under company law and the academy trust's articles of association (Articles). So, for example, company law provides that members can alter the Articles, appoint the auditors and remove a trustee/the trustees.

The DfE has also published guidance and the [2019 version](#) of its governance handbook continues to include a section on Members (see pages 48-51). The National Governance Association has also published helpful guidance clarifying the [role of Members in academy trusts](#).

Over the last 12 to 18 months the DfE has continued to develop its policy in respect of Members. Firstly, it has focused on ensuring a significant degree of separation between the Members and the Board. More recently, the DfE has also focussed on Members' powers. For example, we are aware of circumstances where the DfE has written to Members reminding them of their role in the effective governance of the trust and their powers. In one such letter it included "*These powers enable members to take direct action to secure effective governance.*"

With the growing prominence of the role of Members there is also growing interest in their duties.

Duties

Academy trusts are exempt charities and therefore it is helpful to reflect on charity law. In some ways, the lack of clarity around Members' role and duties reflects the broader charity sector. In a recent Court of Appeal judgement it acknowledged:

"Charity law having to a great extent been developed in the context of charitable trusts rather than charitable corporations, it is not always clear how its principles apply to the latter. ... The present appeal similarly stems from features of [the trust] which would not exist if it were a charitable trust: the existence of members distinct from its directors (or "trustees")..."

The Charity Commission issued guidance in 2004 (called *RS7 - Membership Charities*) which stated "*The Charity Commission takes the view that members have an obligation to use their rights and exercise their vote in the best interests of the charity for which they are a member.*" The legal basis for this was the Commission's view that the rights "*that exist in relation to the administration of a charitable institution are fiduciary*". Whilst broadly welcomed at the time there was a question as to whether a court would uphold this interpretation. The guidance itself acknowledged "*Some uncertainty does exist, however, about the extent to which members of charitable companies are legally obliged to vote in the best interests of the charity of which they are a member. It has been argued that the members of charitable companies are in the same position legally as the members of non-charitable companies.*"

An article written by the Head of Legal Policy and Litigation at the Charity Commission, on members' duty to further the [charitable purpose](#) in February 2014 shows that the uncertainty remained. This is interesting because in the Charities Act 2011 a statutory duty was included for members of charitable incorporated organisations (CIOs). CIOs, a new type of charitable organisation) were created by the Charities

Act 2006 but their introduction was delayed until January 2013. It appears that the opportunity to legislate to clarify this point for CIOs was spotted and taken. Section 220 states:

“Each member of a CIO must exercise the powers that the member has in that capacity in the way that the member decides, in good faith, would be most likely to further the purposes of the CIO.”

The Court of Appeal ([Lehtimäki v The Children's Investment Fund Foundation \(CIFE\)](#)) last year appeared to support the Charity Commission's long held view and held that a member was a fiduciary and owed equivalent duties to members of a CIO. The Court was clear to confine its judgement to the facts and declined to give guidance as to whether members of other charities would similarly have fiduciary duties. Unfortunately, it also did not rule on the extent of the fiduciary duties. When you take into account the power that was in question in this case (a power to approve/veto a disposition of trust assets to another charity associated with one of the directors) the rationale for the Court's ruling seems very clear.

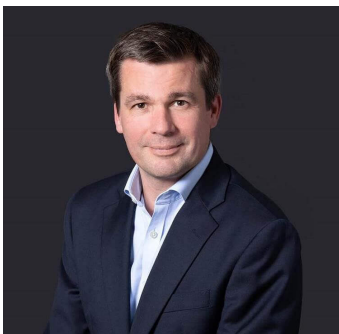
Whilst this judgment does not categorically answer the point for academy trusts it does provide helpful guidance. The first question to ask is, for what purpose have Members of academy trusts acquired their rights and powers? If it is for the interests of the academy trust and/or its beneficiaries (e.g to promote effective governance) then that would indicate a fiduciary relationship. Where there is a there is a fiduciary power there will be a corresponding fiduciary duty.

At this point it is also worth noting that many academy trusts will have adopted the DfE's model Articles which a number of years were updated to include at Article 16A (this is clearly different than the duty on CIO members):

“In exercising their rights under these Articles and the Companies Act 2006, the Members shall not do anything or take any action which would cause the Academy Trust to contravene its Objects.”

We recommend that trusts consider as a minimum putting in place a letter of appointment for Members. The letter could, amongst other things, set out the nature of the role and the required level of commitment. It would also provide an opportunity to include a statement to reflect the Charity Commission's view where Members agree to exercise their powers as a member in the way that they decide, in good faith, would be most likely to further the objects of the trust.

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